APPEAL NO. 93319

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On March 15, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue to be determined at the CCH was: "Was there a bona fide offer of work made by Employer when Claimant was released to return to work performing light duty?" The hearing officer determined that the employer made a bona fide offer of employment to the appellant, claimant herein, on (date of injury), which was subsequently accepted by claimant, with a report to work date of October 9, 1992.

Claimant contends the hearing officer erred in several findings and that the "Employer didn't offer claimant on Sept. 28, 1992, a permanent light duty job." Respondent, carrier herein, responds that the decision is supported by the evidence and requests that we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

This case solely involves whether or not a bona fide offer of employment was made and consequently hinges on credibility of the witnesses. It is undisputed that claimant sustained a compensable back injury on June 11, 1992, (all dates are 1992 unless otherwise noted), while driving a van for the Methodist Home, employer herein. Claimant began receiving temporary income benefits (TIBS) beginning June 11th. Claimant stated that he called (Ms. B), employer's personnel director, around August 27th or 28th about returning to work driving the van. Claimant stated Ms. B told him he would need a medical release to return to work. Claimant testified to, and offered into evidence, a medical release he had obtained which returned him to light duty work on September 2nd, with restrictions of "no bending, stooping, or lifting greater than 25-30 lbs." Claimant testified he saw Ms. B on September 3rd but the van job was no longer available. Ms. B later testified the van job that had been available was delivering supplies and groceries weighing more than 30 pounds, and involved going up and down several flights of stairs. Ms. B stated she did not believe this met the doctor's restrictions. It is undisputed that Ms. B offered claimant a position mowing lawns and trimming hedges at the September 3rd meeting. Claimant stated he refused this job because he did not think he could do it, that, as he had an artificial leg, he could not push a lawn mower and that it involved bending, stooping and lifting. Claimant did not give Ms. B the medical release to return to light duty, because the van job was not available. Claimant stated that he continued to contact Ms. B every two weeks or so asking about the availability of a job. It is undisputed that claimant and Ms. B spoke on September 28th. Who called whom and exactly what was said is disputed. Ms. B testified she called claimant and offered him a light duty position of night monitor at employer's (ranch). Ms. B testified she told claimant it was a permanent full-time position at the same wages as claimant's previous position. Ms. B is a little hazy about details of the position but did state it was a night job, either from 11:00 p.m. to 7:00 a.m., or midnight to 8:00 a.m.

Ms. B stated, and claimant does not deny, that claimant was reluctant to accept the night position because claimant was a single parent with a 14-year-old daughter at home. Claimant denies a position was ever offered. Ms. B states claimant asked if he could think about the position and would call Ms. B back. Ms. B stated that when claimant had not called back by October 5th, Ms. B called claimant again and spoke with a lady Ms. B assumed was claimant's wife regarding the night monitor position at the ranch. The lady, who later became claimant's wife, told Ms. B, according to Ms. B's testimony, that claimant was at the doctor's office but that she (the wife) was encouraging claimant to take the position.

It is at this point that the testimony gets very fuzzy and contradictory. Claimant testified that his father had died on October 1st in (city), Texas, 179 miles from (city). Claimant testified he went to Longview but returned to Waco on October 5th to go to the doctor. Claimant concedes Ms. B spoke with his wife. Ms. B states "later that week" claimant called her and accepted the position and that they agreed claimant would go to the ranch on October 9th (a Friday), at 10:00 a.m., to meet with (Mr. T) about work details and hours. Ms. B defines "later that week" as being perhaps Wednesday, October 6th, or maybe Thursday. Ms. B concedes that claimant told her about a death in the family and that claimant had to go out of town for the funeral but that he would be back on October 9th and would meet with Mr. T. It is undisputed that claimant did not meet with Mr. T or go to the ranch on October 9th.

Claimant's version is that he called Ms. B back on October 5th, told her about the death in the family and that he was going to the funeral. Claimant testified no specific offer of a position was ever made, no details were given and that he never accepted a position. Claimant does concede that Ms. B had mentioned something about a night monitor position at the ranch but nothing definite was ever decided. Claimant states he told Ms. B he "would be interested in look (sic) at the job opening. . . ." Claimant states that he told Ms. B he would call her when he returned from the funeral and they would set up an appointment with Mr. T to "find out about the job." Claimant appears to agree that Ms. B made an appointment for claimant to speak with Mr. T at the ranch on October 9th but "this was not a date to report to work."

Mr. T testified that he is the child care coordinator at employer's ranch and would be the night monitor's supervisor. He explained the duties and that the ranch was 12 to 15 miles outside of Waco. The night monitor position encompassed monitoring a gate entrance, walking 100 to 200 yards to check the cottages and facilities each hour and to complete some paperwork at the desk in the office. The heaviest object the monitor would be lifting or carrying was a flashlight. Mr. T explained that normally with new hires he would make the decision on hiring, but since claimant was already an employee on workers' compensation "trying to get off," Ms. B would make the decision on employment and could assign the employee to the ranch. Claimant, on cross-examination, established that he

called Mr. T on December 15th and that Mr. T did not have an appointment noted on his calendar for claimant for October 9th. Mr. T explained that when he makes the appointment with an individual, he would note it in his appointment book and call the individual, but if Ms. B had made the appointment, he might not have noted it and would leave it up to Ms. B to contact the individual to confirm the appointment.

Ms. B further testified she had reviewed the doctor's restrictions and believed that the position of night monitor at the ranch met those restrictions. After claimant failed to keep the appointment with Mr. T at the ranch on October 9th, Ms. B states she wrote claimant a letter, dated October 12, 1992, detailing the events and advising claimant "in light of the fact that you do not appear to want this position, we have decided that we can no longer wait and have extended an offer to another candidate." It is undisputed that claimant made no further contact with the employer until his TIBS stopped on November 11th.

As may be evident in the recitation of the evidence, there were inconsistencies and contradictions in the evidence and testimony of both claimant and Ms. B, on behalf of the employer. The hearing officer is the sole judge of the weight and credibility to be given to the evidence. Article 8308-6.34(e). The hearing officer resolves conflicts and inconsistencies in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. App.-Amarillo 1974, no writ). As the finder of fact, the hearing officer is privileged to believe all, part or none of the testimony of a witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). The hearing officer clearly believed the employer's witnesses that there was an offer of employment made to claimant on September 28th, that claimant accepted the employer's verbal offer of the night monitor position ". . . subsequent to Tuesday, October 5, 1992 and was to report for work with employer on Friday, October 9, 1992."

Claimant disputes that the doctor's work release letter of September 2nd was for anything other than a van driver position, that he had actually been offered a light duty position on September 28th, or that he had accepted a position on October 5th, and consequently that he failed to report for work on October 9th because he had never been given the night monitor position.

Both parties cite Rule 129.5 (Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.5). For sake of clarity, that Rule is set forth in its entirety:

Rule 129.5: Bona Fide Offers of Employment

(a)In determining whether an offer of employment if bona fide, the commission shall consider the following:

(1)the expected duration of the offered position;

(2)the length of time the offer was kept open;

(3)the manner in which the offer was communicated to the employee;

(4)the physical requirements and accommodations of the position compared to the employee's physical capabilities; and

(5)the distance of the position from the employee's residence.

(b)A written offer of employment which was delivered to the employee during the period for which benefits are payable shall be presumed to be a bona fide offer, if the offer clearly states the position offered, the duties of the position, that the employer is aware of and will abide by the physical limitations under which the employee or his treating physician have authorized the employee to return to work, the maximum physical requirements of the job, the wage, and the location of employment. If the offer of employment was not made in writing, the insurance carrier shall be required to provide clear and convincing evidence that a bona fide offer was made.

(c)Employment is "geographically accessible" to the injured employee if it is within a reasonable distance from the employee's residence unless the employee established through medical evidence that the employee's physical condition precludes travel of that distance.

In this case, there was no written offer of employment; consequently, the carrier is required to provide "clear and convincing evidence" that a bona fide offer was made. Rule 129.5(b) cited above. As stated in Rule 129.5(a) in determining whether an offer of employment is bona fide, we will consider the five listed elements: (1) Expected duration of the offered position. The employer's testimony, and the hearing officer's finding, was that the position was a full-time, permanent position. (2) The length of time the offer was kept open. Although no specific time was stated, Ms. B's testimony was that claimant could consider whether he wanted the position. The offer was kept open at least a week until October 5th, when Ms. B testified, and the hearing officer found, that claimant accepted the position. (3) The manner of communication was by telephone. Claimant and Ms. B had previously communicated by telephone and it was agreed that Ms. B discussed the position (claimant denies an offer was made) with both claimant and claimant's wife on October 5th. (4) Although claimant argues that the doctor's September 2nd release to light duty was only for a van driver, the plain reading of the release does not so limit it. The release states claimant ". . . has still got some pain in the L1,2 area. . . . He can probably go back to work doing light duty with no bending, stooping, or lifting greater than 25-30 lbs. His old job of

driving a van was not available to him when he went back and he could probably still do that also." (Emphasis added). Fairly read, the doctor in this release was not restricting claimant only to van driving, as claimant maintains, and that the night monitor position could be included in the terms of this work release. (5) The distance of the position from claimant's residence must be reasonably accessible (Rule 129.5(c)). Claimant estimated the distance to the ranch to be 20 or 30 miles. Ms. B estimated the distance at 12 miles and Mr. T, who testified he drives into Waco daily, states the distance is less than 15 miles. We find the offered employment to be "geographically accessible" and the less than 15 miles from downtown Waco to be a reasonable distance within the definition of Rule 129.5(c). *See* Texas Workers' Compensation Commission Appeal No. 92181, decided June 25, 1992, as to what constitutes reasonableness and geographic accessibility under the 1989 Act.

Although Ms. B was somewhat vague and unsure of all the specifics of the night monitor position, she was clearly able to convey the general requirements and duties of the position, that the wage would be the same as the preinjury wage, and that the duties were well within the physical limitations under which the doctor authorized claimant to return to work. According to Ms. B's testimony, the location of the offered job was made known to claimant and he stated he knew where the ranch was. Consequently, the hearing officer, in weighing the evidence, could properly find that the offer of employment was made on September 28th, that the offer was accepted on October 5th, and that claimant was to go to the ranch on October 9th to meet with Mr. T and receive specific instructions. In our view, the challenged findings are sufficiently supported by clear and convincing evidence that a bona fide offer of employment was made pursuant to Rule 129.5(b).

Finding the decision of the hearing officer to be supported by sufficient evidence, and finding the decision not to be so against the great weight and preponderance of the evidence as to be manifestly unjust, we affirm.

Thomas A. Knapp
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Gary L. Kilgore
Appeals Judge